144

(3) (3)

Nos. 08-1332 & 08-1472

Supreme Court, U.S.
FILED
NOV 3 - 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CITY OF ONTARIO,
ONTARIO POLICE DEPARTMENT,
and LLOYD SCHARF,

Petitioners,

v.

JEFF QUON, et al.,

Respondents.

USA MOBILITY WIRELESS, INC.,

Petitioner,

v.

JERILYN QUON, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS JEFF QUON, ET AL.

MICHAEL A. MCGILL
LACKIE, DAMMEIER & MCGILL APC
367 North Second Avenue
Upland, California 91786
(909) 985-4003

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED BY ONTARIO'S PETITION

1. Whether a SWAT team member has a reasonable expectation of privacy in text messages transmitted on his SWAT pager, where the police department has no formal no-privacy policy pertaining to text message transmissions and the operational realities of the police department are such that SWAT team members are explicitly told their messages would remain private if they paid any additional overage charges.

2. Whether Petitioner Ontario fails to show a true conflict among the various circuits worthy of this Court's review, especially when the Ninth Circuit did not utilize a "less intrusive means" analysis and specifically stated so.

3. Whether employees who send text messages to other employees' pagers have a reasonable expectation of privacy in those messages, when the employees are each aware that the employer has a policy of not reviewing the text messages.

QUESTIONS PRESENTED BY ARCH WIRELESS' PETITION

1. Whether Arch Wireless has failed to preserve for review its argument that it is a dual provider.

2. Whether Arch Wireless is properly considered an "electronic communication service" – defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications" – when it contracted with Ontario to allow SWAT team members to send or receive electronic text messages.

PARTIES TO THE PROCEEDINGS

Petitioners (Defendants and appellees below):

CITY OF ONTARIO, ONTARIO POLICE DEPARTMENT, and LLOYD SCHARF

ARCH WIRELESS OPERATING COMPANY, INCORPORATED (listed on petition as USA Mobility Wireless, Inc.)

DOREEN KLEIN

Respondents (Plaintiffs and appellants below):

JERILYN QUON, APRIL FLORIO, JEFF QUON, STEVE TRUJILLO, and DEBBIE GLENN

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED BY ONTARIO'S PETITION i

QUESTIONS PRESENTED BY ARCH WIRELESS' PETITION i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT OF THE CASE 4

REASONS FOR DENYING ONTARIO'S PETITION 6

I. THE NINTH CIRCUIT'S RULING DOES NOT ADOPT A "LESS INTRUSIVE MEANS" TEST AND DID NOT CREATE A SPLIT IN THE CIRCUITS 7

II. THE NINTH CIRCUIT'S RULING THAT ONTARIO CREATED A REASONABLE EXPECTATION OF PRIVACY DOES NOT WARRANT REVIEW BY THIS COURT 10

III. THE NINTH CIRCUIT'S OPINION IS CONSISTENT WITH THIS COURT'S PRECEDENT 13

REASONS TO DENY ARCH WIRELESS' CONDITIONAL CROSS-PETITION 16

I. ARCH WIRELESS' CLAIM THAT THE NINTH CIRCUIT APPLIED AN "ALL OR NOTHING" APPROACH IS UNAVAILING 17

TABLE OF CONTENTS – Continued

Page

II. THE NINTH CIRCUIT'S OPINION DOES NOT WARRANT REVIEW 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

O'Connor v. Ortega, 480 U.S. 709 (1987) ..... *passim*

Schowengerdt v. General Dynamics Corp., 823 F.2d 1328 (9th Cir. 1987) 7, 9

STATUTES

18 U.S.C. § 2510(17) 21

18 U.S.C. § 2510(15) 22, 24

18 U.S.C. § 2701 15

18 U.S.C. § 2711(2) 22

SUPREME COURT RULES

Rule 10 10

INTRODUCTION

The appellate decision below arose out of litigation brought by Jerilyn Quon, April Florio, Jeff Quon, and Steve Trujillo (collectively "Plaintiffs") against the City of Ontario (their employer) and Arch Wireless Operating Company ("Arch Wireless").[1]

With respect to the City of Ontario, Plaintiffs allege that the City, its Police Department and its Chief of Police, Lloyd Scharf (collectively "Ontario"), violated their Fourth Amendment rights by requesting from Arch Wireless and reviewing private text messages transmitted via City-owned pagers. With respect to Arch Wireless, Plaintiffs allege that Arch violated the Stored Communications Act ("SCA") by divulging to Ontario the text messages.

The appellate decision held that Ontario's unique practice of allowing employees to maintain their privacy by not reviewing the text messages in exchange for payment by the employee of any overage charges created a reasonable expectation of privacy. Both the trial court and the appellate court below found that this reimbursement policy was in fact the "operational reality" within Ontario and expressly provided the Plaintiffs with an expectation of privacy. Furthermore, the appellate decision held that the search was justified at its inception, but was

---

[1] Arch Wireless later merged and became USA Mobility Wireless, Inc. For ease of reference, Plaintiffs will refer to Arch Wireless in this brief.

unreasonable in its scope. Accordingly, the appellate decision below concluded that Ontario violated the Plaintiffs' Fourth Amendment rights.

With regard to Arch Wireless, the appellate decision reviewed the plain language of the SCA as well as its rather unambiguous legislative history and found that Arch Wireless' services were properly considered an "electronic communication service" under the SCA. Since Arch Wireless provided an electronic communication service, it could not lawfully disclose the text messages without permission of an "addressee or intended recipient." Accordingly, the appellate decision below concluded that Arch violated the SCA.

Ontario filed a Petition for a Writ of Certiorari, while Arch Wireless filed a Conditional Cross-Petition for a Writ of Certiorari. However, neither Petitioner has presented any "compelling reasons" in support of their Petitions. *See* Sup. Ct. R. 10.

Ontario attempts to inflate their cause by suggesting that the appellate decision creates a split in circuits by utilizing a "less intrusive means" analysis. This argument, however, is belied by the plain language of the appellate decision as well as the panel's opinion in denying Ontario's rehearing petition. The appellate decision itself carefully applies the correct legal standard. Any lingering doubt was dispelled in the panel's opinion where the decision author, Judge Wardlaw, unambiguously stated that the panel did not apply a "less intrusive means" analysis.

Next, Ontario argues that the appellate decision is erroneous because it hinges Plaintiffs' expectation of privacy entirely upon Ontario's unique practice of not reviewing text messages in exchange for payment of the overages. Ontario claims that in reaching this conclusion, the Ninth Circuit undermined the "operational realities of the workplace" standard. However, the appellate decision does just the opposite. The appellate decision reflects a careful consideration of the working environment and operational realities that exist within Ontario Police Department. Ignoring Ontario's unique practice, as Ontario suggests, would be to ignore the operational realities standard altogether.

Ontario's final claim is that the appellate decision expands Fourth Amendment protection beyond reasonable limits. Like the others, Ontario attempts to breathe life into their cause by exaggerating the issue. The decision does not expand constitutional protections and involves four employees of Ontario Police Department who were each aware of Ontario's unique practice of keeping text messages private. In practical terms, the decision is insignificant since it is based entirely on Ontario's own unique practice, and one that most employers would not embrace.

Arch Wireless' Petition is even more tenuous. Arch Wireless argues the appellate decision is erroneous because it applied a categorical approach when examining Arch Wireless' service. However, Arch Wireless invited both the District Court and the

Ninth Circuit to apply such an approach and has not preserved the issue for review.

Simply put, Ontario and Arch Wireless have failed completely to carry their burden of demonstrating that there are any compelling reasons for this Court to grant their Petitions. Accordingly, the Petitions should be denied.

STATEMENT OF THE CASE

In 2001, Arch Wireless contracted to *provide wireless text-messaging services* for the City of Ontario. The City received twenty two-way alphanumeric pagers, which it distributed to its employees, including Jeff Quon and Steve Trujillo, who were employed as police sergeants. Opinion, App. 3.[2]

Ontario had no official no-privacy policy directed to text-messaging by use of the pagers. However, it did have a general policy about computer and internet usage that indicated Ontario reserved the right to monitor email and internet usage. In 2000, before Ontario acquired the pagers, Trujillo and Quon signed an acknowledgment form indicating they were aware of this policy. Opinion, App. 4.

[2] All references to "App." shall refer to Ontario's appendix.

Two years after signing the acknowledgement form, Quon attended a meeting during which Lieutenant Steve Duke informed all present that the pager messages "were considered e-mail, and that those messages would fall under the City's policy as public information and eligible for auditing." Quon "vaguely recalled attending" this meeting, but did not recall Lieutenant Duke stating at the meeting that use of the pagers was governed by the City's Policy. Opinion, App. 5.

Although Ontario had no official policy expressly governing use of the pagers, it did have an informal policy governing their use. Under Ontario's contract with Arch Wireless, each pager was allotted 25,000 characters, after which Ontario was required to pay overage charges. Lieutenant Duke "was in charge of the purchasing contract" and responsible for procuring payment for overages. He stated that "[t]he practice was, if there was overage, that the employee would pay for the overage that the City had. . . . [W]e would usually call the employee and say, 'Hey, look, you're over X amount of characters. It comes out to X amount of dollars. Can you write me a check for your overage[?]' " Opinion, App. 6.

The informal policy allowed officers to maintain their privacy in their text messages as long as they paid the overage charges. Sergeant Quon testified that Lieutenant Duke would tell him that "if you don't want us to read it, pay the overage fee." Per the policy, Quon went over the monthly character limit

"three or four times" and paid Ontario for the overages. Opinion, App. 8.

In August 2002, Quon and another officer again exceeded the 25,000 character limit and Lieutenant Duke let it be known at a meeting that he was "tired of being a bill collector." In response, Chief Scharf ordered Lieutenant Duke to "request the transcripts of those pagers for auditing purposes." Opinion, App. 8.

Ontario was not able to access the text messages themselves. Instead, they contacted Arch Wireless who voluntarily disclosed the transcripts to Ontario without notifying Plaintiffs. Opinion, App. 9.

REASONS FOR DENYING ONTARIO'S PETITION

Ontario does its best to inflate this case into one creating a split in circuits and a "startling extension of Fourth Amendment privacy rights." *See* Ontario Pet. 15. However, this case involves nothing of the sort.

Contrary to Ontario's claim, the appellate decision makes clear that it did not adopt a "less intrusive means" analysis. Furthermore, the decision is a rather straightforward application of the factors espoused in *O'Connor v. Ortega*, 480 U.S. 709 (1987). In fact, the decision itself is entirely dependent upon Ontario's self-initiated practice of allowing employees

to maintain their privacy. Quite candidly, the appellate decision acknowledged that Ontario was its own worst enemy.

I. The Ninth Circuit Did Not Adopt A "Less Intrusive Means" Test And Did Not Create A Split In The Circuits.

Ontario claims that the appellate decision below creates a split in the circuits and departs from Supreme Court precedent by applying a "less intrusive means" test. The court, however, never adopted a less intrusive means test, and the author of the panel opinion explicitly disclaimed doing so. Ontario's argument stems entirely from the court's citation to *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328 (9th Cir. 1987), and is a desperate attempt to blow life into its petition.

Ontario spends time and ink explaining how this Court has cautioned against the use of the "less intrusive means" test, but completely fails to demonstrate that the appellate decision below did use such a test.

In fact, Ontario made the exact same argument it makes here to the Ninth Circuit in its Petition for Panel Rehearing and Rehearing En Banc. In denying the Petition for Panel Rehearing, the panel responded as follows:

> We did not adopt a "less intrusive means" test. [citation omitted]. The "less intrusive

means" discussion relates to the jury's finding that Chief Scharf conducted the search for noninvestigatory purposes. *O'Connor* provides the framework for evaluating the reasonableness of a search in this context, which the dissent does not dispute. [citation omitted]. Applying this framework, we first held that the search was reasonable "at its inception" because the officers conducted the search for the work-related purpose of ensuring that "officers were not being required to pay for work-related expenses," as the jury had found below. *Quon*, 529 F.3d at 908. We then turned to the second prong of the *O'Connor* test: determining whether the measures adopted were "reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct]." 480 U.S. at 726, 107 S.Ct. 1492 (internal quotation marks omitted). Because "the Department opted to review the contents of all the messages, work-related and personal, without the consent of Quon," we held that the search "was excessively intrusive in light of the noninvestigatory object of the search." *Quon*, 529 F.3d at 909. This holding was also based on our conclusion that Quon's "reasonable expectation of privacy in those messages" was not outweighed by the government's interest – again, as found by the jury – in auditing the messages. *Id.*

The dissent incorrectly represents that we held that the search was unreasonable "*because* the city could have used less

> intrusive means to accomplish the objectives of the search." [citation omitted] (emphasis added). Although we cited *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1336 (9th Cir. 1987), we did not apply a "less intrusive means" test. *Quon*, 529 F.3d at 908-09; cf. Dissent at 777-78 (conceding that "the panel does not explicitly state it is applying a least restrictive means test"). We mentioned other ways the OPD could have verified the efficacy of the 25,000-character limit merely to illustrate our conclusion that the search was "excessively intrusive" under *O'Connor*, when measured against the purpose of the search as found by the jury. *Quon*, 529 F.3d at 909.

Finally, the panel explained that it "only considered *Schowengerdt* to the extent necessary to consider the district court's decision." *See* Opinion, App. 134 fn.1. That the authors of the opinion expressly state that their opinion did not utilize the "least intrusive means" test should dispel the Petitioner's claim.

Furthermore, Ontario's argument places form over substance. The appellate decision could have just as easily not included the citation to *Schowengerdt*, and the holding would not change. The decision clearly identifies that it is assessing whether the measures Ontario took were reasonably related to the objectives of the search and were not excessively intrusive. The Ninth Circuit correctly examined whether "the depth of the inquiry or extent of the

seizure exceeded that necessary for the government's legitimate purposes." Opinion, App. 35. The Ninth Circuit did not automatically find the search unreasonable based merely on the existence of less intrusive means, but rather because the means that were used were excessive and unreasonable in light of the relatively insignificant need for the information. The Ninth Circuit applied the proper analysis and reached an appropriate decision based upon all of the circumstances. Since the Ninth Circuit did not utilize a "less intrusive means," no split among the circuits was created and review is not necessary.

II. The Ninth Circuit's Ruling That Ontario Created A Reasonable Expectation Of Privacy Does Not Warrant Review By This Court.

Ontario seeks review by this Court simply because it is unhappy with the appellate decision below. In support, Ontario offers no significant legal or factual argument, and in no way attempts to demonstrate that review is appropriate under Rule 10 of the Rules of the Supreme Court.

In essence, Ontario feels that Lieutenant Duke should not be able to establish an expectation of privacy among the officers he oversees. More than that, Ontario suggests that both the District Court and the Ninth Circuit erred when they even considered Lieutenant Duke's policy when examining whether there was an expectation of privacy.

However, both the District Court and the Ninth Circuit properly applied the *O'Connor* test, recognizing:

> Lieutenant Duke made it clear to the staff, and to Quon in particular, that he would not audit their pagers so long as they agreed to pay for any overages. Given that Lieutenant Duke was the one in charge of administering the use of the city-owned pagers, his statements carry a great deal of weight. Indeed, before the events that transpired in this case the department did not audit any employee's use of the pager for the eight months the pagers had been in use. Opinion, App. 30.

Even Ontario concedes "[t]o that point, the panel's reasoning is a straightforward application of *O'Connor's* 'operational realities of the workplace' standard." *See* Ontario Pet. 16. In other words, the Ninth Circuit applied the appropriate reasoning, but simply reached an unfavorable result.

Ontario is asking this Court to review and conclude as a matter of law that the actions of a high-ranking official within a police department should not be considered when evaluating the "operational realities of a workplace." However, the notion presented by Ontario in and of itself erodes the very standard they profess to be supporting. *O'Connor* makes clear that analyzing an expectation of privacy involves an in-depth factual inquiry, and that actual office practices or procedures may affect one's expectation of privacy. The District Court and the Ninth Circuit did

just that, and Ontario simply disagrees with the outcome.

Furthermore, the inquiry here is predicated upon a unique set of facts that presents no important constitutional question and no other basis for review by this Court. Ontario had no official policy with regard to the use of text-message pagers. The only mention of text-messages was at a meeting where Ontario informed only those employees in attendance that the e-mail policy applied to the text-message pagers. Ontario did not bother to publicly notify anyone, or even send out a written policy. Quon had no recollection of that being discussed at the meeting.[3] Opinion, App. 5-6. Thus, the City's actions, which include Lieutenant Duke's policy, each contributed to the finding of a reasonable expectation of privacy.

In *O'Connor*, this Court mandated a "'case-by-case' approach to determining whether an employee has a reasonable expectation of privacy in the workplace." *O'Connor*, 480 U.S. at 718. The appellate decision below follows this Court's instruction that "public employer intrusions on the constitutionally protected privacy interests of government employees

---

[3] Essentially, Ontario is advocating for a "per se rule" that employees may never have privacy in their workplace pagers. Such a rule would require courts to ignore the fact that Ontario had no written workplace policy on pagers and the day-to-day practice that officers would retain their privacy as long as they paid the overages. Ontario's per se rule would eviscerate the "operational realities" standard.

. . . should be judged by the standard of reasonableness *under all the circumstances*." *Id.* at 725-26. As such, the ruling below does not merit review by this Court.

III. The Ninth Circuit's Opinion Is Consistent With This Court's Precedent

Ontario further argues that review is warranted based upon the Ninth Circuit's conclusion that Trujillo, Florio and Jerilyn Quon maintained an expectation of privacy in the text-messages sent to Jeff Quon on his Department-issued pager. The argument is that it is not objectively reasonable to expect privacy in text-messages sent to someone else's workplace pager, despite the unique circumstances.

Ontario offers no legal or factual support that the appellate decision is erroneous. Without citing any authority, Ontario claims "[i]t is not objectively reasonable to expect privacy in a message sent to someone else's workplace pager." Ontario Pet. 30. However, the Ninth Circuit's decision reflects a rather straightforward analysis of the facts of this case with this Court's prior decisions. Moreover, the decision itself does not expand rights.

Ontario concedes that the appellate decision properly analogized text-messages to telephone calls, regular mail, and e-mail, but simply reached the wrong result. Ontario's entire claim is that in order for Trujillo, Florio and Jerilyn Quon's expectation of privacy to be objectively reasonable, "the sender

would have to believe the recipient's employer does *not* have a no-privacy policy in place. . . ." Ontario Pet. 30.

In passing, Ontario asserts that the Ninth Circuit expressly did not rely upon Lieutenant Duke's informal policy when reaching its conclusion as to Trujillo, Florio and Jerilyn Quon. This claim is overstated. The appellate decision makes clear, and Ontario concedes, that Trujillo was a SWAT team member, subject to Lieutenant Duke's informal policy. Since Trujillo was also subject to and aware of the privacy policy, the analysis with respect to Trujillo would be the same as it is with Quon.

Furthermore, the undisputed evidence provided by Florio and Jerilyn Quon in their declarations is that they had no reason to believe that the Department would review the messages they sent Quon. This understanding was based upon Lieutenant Duke's informal policy. In fact, both the District Court and the Ninth Circuit acknowledged that "Lieutenant Duke made it clear *to the staff*, and to Quon in particular, that he would not audit their pagers so long as they agreed to pay for any overages." Opinion, App. 30. Florio and Jerilyn Quon were staff.

Thus, Ontario's concerns about the breadth of the appellate decision are unfounded. This is not a case that involves a private individual sending a text message to a public employee and expecting privacy. The Plaintiffs are public employees working for Ontario who maintained an expectation of privacy

based upon Lieutenant Duke's informal policy. Ontario's attempt to exaggerate the issue into one that "extends Fourth Amendment protection" is unavailing. Ontario Pet. 28.

Since the Plaintiffs did in fact have a belief that their text messages would remain private, by Ontario's own argument, the Plaintiffs' expectation of privacy would be reasonable.

Finally, the Ninth Circuit's decision is further based upon its conclusion that the Plaintiffs maintained an expectation of privacy under the Stored Communications Act, found at 18 U.S.C. §§ 2701-2711. The appellate decision concludes "[a]s a matter of law, Trujillo, Florio and Jerilyn Quon had a reasonable expectation that the Department would not review their messages absent consent from either a sender or recipient of the text messages." Opinion, App. 28-29.

As will be explained further below, the Ninth Circuit's decision with regard to the Stored Communications Act is correct. The fact that the Plaintiffs' text messages were protected from disclosure under the Stored Communications Act served as a legal basis for the Plaintiffs to objectively believe that their text messages would remain private. Since Ontario has failed to address the appellate decision on this point, they cannot successfully argue that the Ninth Circuit was erroneous and that review is warranted.

REASONS TO DENY ARCH WIRELESS' CONDITIONAL CROSS-PETITION

Arch Wireless has not presented a compelling reason for this Court to grant review. Arch Wireless chose not to file its own petition, and only filed this conditional cross-petition on the 30th day after Ontario filed its own petition. Furthermore, in Ontario's petition, it did not argue that the Ninth Circuit erred in its ruling against Arch Wireless. In fact, the petition is utterly silent as to that claim. Attempting an end-around, Arch Wireless now claims that the appellate decision is wrong with respect to the SCA and warrants review.

Arch Wireless' primary argument in support of review is that the Ninth Circuit's interpretation of the SCA is "incorrect and unworkable." *See* Arch Wireless Pet. 11. More specifically, Arch Wireless argues that the Ninth Circuit improperly applied an "all-or-nothing" approach in determining whether Arch Wireless was a provider of an "electronic communications service" ("ECS") or a "remote computing service" ("RCS"). Arch Wireless claims that the Ninth Circuit erroneously failed to consider that it could be providing a dual service. In addition, Arch Wireless argues that the Ninth Circuit erred by "automatically" concluding that Arch Wireless stored messages for purposes of backup protection simply because it was an ECS provider. Arch Wireless' claims are simply disingenuous.

Arch Wireless fails to inform this Court that it was Arch Wireless itself who has maintained from the beginning that it was solely a RCS. The revelation that it now provided a "dual service" was never suggested until after the Ninth Circuit issued its opinion and Arch Wireless submitted its petition for rehearing. In fact, it was Arch Wireless who asked both the District Court and the Ninth Circuit to apply a so-called "all or nothing" approach. To claim that the Ninth Circuit erred by applying the approach Arch Wireless suggested does not merit review.

More importantly, the panel did not apply such a rigid approach. Rather, the panel decision reflects a thorough analysis of the service Arch Wireless provided and an appropriate conclusion. Arch Wireless is clearly an ECS based upon the plain language of the statute. Arch Wireless clearly stores messages for backup protection based upon the undisputed evidence that they, among other things, "archive" messages for "recordkeeping purposes." The panel reached this conclusion based upon the evidence.

I. Arch Wireless' Claim That The Ninth Circuit Applied An "All Or Nothing" Approach Is Unavailing.

Arch Wireless' primary argument in support of review is that the Ninth Circuit "incorrectly assumed that a provider may have only one classification for all of the services it provides, at all times." *See* Arch

Wireless Pet. 12. Arch Wireless argues "[t]he court mistakenly reasoned that because Arch Wireless provided the underlying transmission of the text messages, it must be an 'electronic communication service' for all purposes. . . ." *See* Arch Wireless Pet. 12.

Nothing could be further from the truth.

The record is relatively clear that it was Arch Wireless who took the position from the outset that it provided a RCS "for the services it provides, at all times." Arch Wireless argued and proved that it provided a RCS exclusively. Not once did Arch Wireless ever suggest to the District Court that it provided a dual service, or that certain aspects of its service could be an ECS while others could be a RCS. Instead, Arch Wireless maintained it provided a RCS and could release the text messages to Ontario as a subscriber.

In its ruling at summary judgment, the District Court (who ultimately sided with Arch Wireless) correctly identified the inquiry:

> What is disputed is whether the service provided by Arch Wireless – that is, of being able to retrieve for its subscribers text messages held in long-term electronic storage on its computers that have been sent over its communication network – constitutes a remote computing service or is more properly characterized as an electronic communication service. If the former, then the City's consent would serve to absolve Arch Wireless of liability as it was the subscriber to the

> service. If the latter, then the City's consent is to no avail as only the consent of the originator or intended recipient of such a message (in this case, the plaintiffs themselves) would suffice for the exemption to apply. *See* Ontario Pet. App. 63.

Then, the District Court went on to make the very point Arch Wireless attempts to make now:

> This leads to another point that neither side in this case acknowledges – that Congress recognized that service providers can offer a wide variety of different services, each one being characters differently under the statute. . . . *See* Ontario Pet. App. 79.

With that in mind, the District Court noted that Arch Wireless took the position that it was either solely an ECS or a RCS:

> The parties in this case apparently take an 'all or nothing' approach in how to characterize what Arch Wireless provided to the City – either the provision of text-messaging pager/transcript retrieval service was a remote computing system or it was an electronic communication system. *See* Ontario Pet. App. 80.

On appeal, Arch Wireless' position remained the same. Before the Ninth Circuit, Arch Wireless conceded that its services could only be considered as that of a RCS: "Contrary to Appellants' contention, Arch Wireless provided a 'Remote Computing Service' to the City of Ontario under the terms of the statute."

See Arch Wireless' Opp. Brief, 8. At no time before the Ninth Circuit issued its decision had Arch Wireless ever suggested that it provided a dual service or that its services could ever be considered that of an ECS.

Now, after the Ninth Circuit applied a practical application of the plain language of the SCA, Arch Wireless now seeks to change course.

Knowing that it is impossible to argue around the SCA's definition of an ECS, Arch Wireless now concedes: "Arch Wireless unquestionably acts as an 'electronic communication service' provider when it transmits text messages over its network, and its temporary storage of contents in connection with the transmission process constitutes 'electronic storage.'" *See* Arch Wireless Pet. 16.

Recognizing futility, Arch gives in, and now claims that the panel decision is erroneous because it purportedly failed to take into account the dual functions Arch's service provides. Remarkably, Arch Wireless fails to inform this Court that it was Arch Wireless itself who asked the appellate court to ignore the possibility of a dual function. Because Arch Wireless failed to ever make this argument to either the District Court or the Ninth Circuit, they have failed to preserve it for review.

Next, Arch Wireless spends time and ink arguing that the statutory text of the SCA allows an entity to provide dual services. Arch Wireless points to the legislative history which it suggests confirms its position. The problem Arch Wireless faces is that it

never suggested that it provided a dual service and the claim is now waived. To claim error on the part of the Ninth Circuit for assuming that such a possibility existed – in light of Arch Wireless' expressed position to the contrary – is flawed. More importantly, it utterly fails to demonstrate that review is warranted in this case.

Moreover, Arch Wireless' argument that it is both an ECS and a RCS finds no support in the record. As noted above, Arch Wireless concedes (for the first time) that it acts as an ECS when it transmits text messages. However, Arch Wireless claims that "is not at issue" here. *See* Arch Wireless Pet. 16. Arch Wireless suggests that Plaintiffs allege that Arch Wireless violated the SCA by divulging to Ontario the contents of messages "that were retrieved from its long-term archives – long after the messages were delivered and the temporary storage was deleted." *See* Arch Wireless Pet. 16. This suggestion is wrong.

Plaintiffs have alleged and proven that Arch Wireless violated the SCA when it divulged messages held in "electronic storage" as that term is defined at 18 U.S.C. § 2510(17). Plaintiffs have never suggested that the messages were retrieved from "long term archives," and Arch Wireless never presented any such evidence. Likewise, Arch Wireless failed to present any evidence that the text messages had already

been delivered and that "temporary storage was deleted."[4]

More importantly, Arch Wireless' services could only be considered that of an ECS. An ECS is defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15). On its face, this describes exactly the service that Arch Wireless provided to Ontario, as conceded by Arch Wireless.

In addition, to be considered a RCS, one must provide "computer storage or processing services." 18 U.S.C. § 2711(2). Based upon the evidence, it was clear that Arch Wireless was not providing "computer storage" or "processing services." Although Arch Wireless was "storing" messages, this incidental function was the type Congress clearly felt an ECS would perform.

The Ninth Circuit reviewed the legislative history of the SCA, and found that the Senate Report identified two main services that providers performed in 1986: (1) data communication; and (2) data storage and processing. The Ninth Circuit reasoned that when Congress referred to RCS's "storage and processing of information," it meant the actual storing of virtual information or the farming out of sophisticated processing to a service that would process the

---

[4] Virtually all of the evidence relied upon by the Ninth Circuit was from the testimony of Arch Wireless' Director of Information Technology.

information. Neither of these services even remotely describes the services Arch Wireless provided to Ontario. Since Arch Wireless could never qualify as a RCS based upon the plain language of the SCA, as well as its legislative history, the Ninth Circuit's decision represents a straightforward and legally sound decision. Not only has Arch Wireless failed to demonstrate that their position is legally sound, it has utterly failed to demonstrate that the issue is one that warrants review.

II. The Ninth Circuit's Opinion Does Not Warrant Review

The Ninth Circuit's opinion does not warrant this Court's review because there is no conflict to be resolved. In this case, Plaintiffs sought to enforce their rights under the SCA based upon Arch Wireless' disclosure of text messages to Ontario. Arch Wireless maintained throughout the proceedings below that it acted as a RCS and its disclosure to a subscriber was legally permissible. Plaintiffs argued that Arch Wireless acted as an ECS and since they did not consent to the disclosure, Arch Wireless acted illegally. The District Court sided with Arch Wireless, but the Ninth Circuit reversed. Beyond a simple disagreement with the outcome, Arch Wireless has offered no compelling reason for this Court to grant review.

Arch Wireless argues that review of the SCA would be necessary if review is granted as to Ontario. However, in Ontario's petition for review, not one

mention of the SCA is made. Ontario, who seeks review of the Fourth Amendment claim, does not feel that review of the SCA is necessary. In passing, Arch Wireless states review is necessary so this Court can "correct the Ninth Circuit's misguided understanding of the statutory framework." *See* Arch Wireless Pet. 18. However, Arch Wireless never identifies how the Ninth Circuit's opinion is wrong.

Finally, Arch Wireless makes an emotional plea that "the world's leading providers of computing and online services are located within the Ninth Circuit" and that a "host of unintended consequences" will result if review is not granted. *See* Arch Wireless Pet. 20-21. The claim is grossly overstated.

Contrary to the claim, not every "storage" maintained by a provider of electronic communication will automatically constitute "electronic storage." *See* Arch Wireless Pet. 21. A court will be required to review the actual service provided between the entity and the provider. Here, Ontario clearly paid Arch Wireless to provide it with the ability to "send or receive wire or electronic communications," or text messages. *See* 18 U.S.C. § 2510(15). Thus, the service it provided was that of an ECS.

Arch Wireless' suggestion that the Ninth Circuit somehow eviscerated a provider's ability to act as a RCS is simply false. If a provider provides "storage or processing services," then it is a RCS. What Arch Wireless is really advocating for is the ability to provide a service, but not comply with the federal

disclosure requirements. Arch Wireless allows individuals to communicate electronically and that decision to provide the service is significant and valuable in this electronic age. However, it also requires that they comply with what Congress has determined to be necessary steps to preserve the privacy rights of the individuals using that service. It is simply the price of doing business. If Arch Wireless feels that the SCA strikes an unfair balance in favor of privacy rights, then it should seek to have the law changed.

Arch Wireless has not demonstrated that the Ninth Circuit's opinion warrants review, or that the decision is legally flawed.

CONCLUSION

For the foregoing reasons, the Petitions brought by Ontario and Arch Wireless for writs of certiorari should be denied.

Respectfully submitted,

MICHAEL A. MCGILL
Counsel of Record

LACKIE, DAMMEIER & MCGILL APC
367 North Second Avenue
Upland, California 91786
Phone: (909) 985-4003

Counsel for Respondents